Supreme Court, U.S
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No. 01-536

IN THE

Supreme Court of the United States

DAVID R. TINKLE,

Petitioner,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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WHERE IS MR. SINGLETON?

Nowhere in the record has Mr. Singleton denied any of the evidence brought forth by Tinkle. Nowhere in the record has Mr. Singleton denied the evidence set forth in affidavits by Kenneth LaRue, Charles Wilson, Don Riffel — all of whom were assigned to the Heavy Hauling Equipment Unit under Singleton's supervision. The evidence produced by these men who were supervised by Singleton established facts that supported Tinkle's "prima facie case" of discrimination and retaliation. The evidence showed: the availability of "light duty" jobs and that others similarly situated were afforded "light duty" assignments for extended time periods; the presence of "air-ride suspension trucks" in the Employer's inventory; that the 75 Ton Road Crane was a very difficult piece of equipment to drive and presented an extremely rough ride when driven on the highways, inter alia. All of this evidence was unrebuked — where is Mr. Singleton? A "prima facie case" is one that ". . . will suffice until contradicted and overcome by other evidence". "A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it". Black's Law Dictionary, 4th Ed. (1968); *Reeves* at 149.

The Respondent Employer is still trying to overpower sound reasoning and a "complete review of the record" by extracting selected portions of the record that reflect some of Tinkle's statements — while at the same time "hiding the evil hand" of Singleton. Examples of each such extractions could be shown but for brevity of this reply, only a few are provided. During his deposition, Tinkle answered the questions that were propounded to him. When asked if he had ever driven the 75 Ton Crane prior to injuring his neck

on August 21, 1997, the following was stated at page 38, lines 7-11 of the deposition transcript taken on 2-21-00:

> 7 Q. So you were driving the crane from Ardmore
>
> 8 back to South High?
>
> 9 A. Yes.
>
> 10 Q. Had you ever done anything like that before?
>
> 11 **A. I have drove it once before.**

Emphasis ours. The only pertinent question raised in the deposition was whether Tinkle had driven the crane before, which he answered that he had driven it "once before". In this vein, a jury could find that prior to Tinkle testifying in the *Riffel* case, driving the Road Crane was not part of his normal duties.

In his affidavit at para. #20, Tinkle said:

> Even after I was able to return to work and resume my normal duties (after two weeks, approximately the first or second week of September, 1997), Singleton took the position that I had to return "100 per cent" — meaning that I had to perform all possible duty assignments, including driving the 75 Ton Road Crane. Again, in nearly twenty (20) years of service with OG&E, on August 21, 1997, **I had driven the 75 Ton Road Crane only one other time**, and curiously, after only about

two months after testifying for Mr. Riffel, driving the Road Crane then became part of my job duties. Emphasis ours.

In his deposition taken on 2-21-00 at page 42, Lines 8-16, the following questions and responses were given:

Q. When you were instructed to drive the crane that day, did you refuse or tell John that you didn't think it would be good for you?

A. **I told John that I didn't think I should be in it; that I knew how to run it.** And he said, "You need the experience and you're going to drive it." And I said, "I know how to drive it." He said, "You're being paid top pay to do everything. You will drive it back from Ardmore."

Emphasis ours.

In his affidavit at para. #5, Tinkle stated:

> When Singleton ordered me to drive the crane from Ardmore, the regular crane operators, Rick Breakbill and Mike Neary were both on duty and available to drive the Road Crane. **I begged John Singleton to not make me drive the 75 Ton Road Crane back from Ardmore, and in doing so, I re-emphasized that due to my back and neck injuries that I did not believe I could handle the assignment.** Singleton said to me "you will drive it, that's it and I don't want to hear anymore about it". Breakbill was standing there when I was talking to Singleton about not wanting to drive the 75 Ton Road Crane. Breakbill was assigned by Singleton to serve as an escort for me; however, Breakbill told me that I should not be in the Road Crane and offered to drive it in spite of Singletons order. Because of the testimony that I had given in the *Riffel* case, I was fearful that Singleton would take disciplinary action against me if I failed to follow his order of driving the Road Crane. I declined Breakbill's offer to drive the crane from Ardmore.

Emphasis ours.

Breakbill was not only a witness to this conversation but was listed as a witness to be called at trial. The district court should have resorted to legal principles of "construction" — thereby "applying the probable aim and purpose of the provision". Black's Law Dictionary, 4th Ed. (1968). From the evidence, a reasonable jury could find that Tinkle did explain to Singleton the reasons for not wanting

to drive the Road Crane. Even if Tinkle did not explain with particularity the reason for not wanting to drive the 75 Ton Road Crane, there is no evidence offered by Singleton denying Tinkle's assertions. Applying the principles of *Reeves* at 149, there is no need for Tinkle to produce "additional evidence" beyond his "prima facie case". Ergo, applying the "common sense" principles in *Oncale*, Singleton knew or should have known that Tinkle's physical problems would pose not only a danger to himself in driving the Road Crane for 80 miles on interstate highway, but also created a dangerous condition to other motorists. As such, a jury could decide that Singleton (supervisor) was charged with "knowledge" of Tinkle's: (1) neck surgery and recent return to work; (2) his prior back surgeries and other surgeries while under Singleton's supervision; (3) that he had only driven the Road Crane one (1) other time, and that was after he testified in opposition to Singleton and OG&E in the *Riffel case*; (4) the cabin of the Road Crane was very small and compact, and Tinkle's body size (6'2") was too large to allow for adequate space in driving the crane, his head striking the roof with every hard bump and re-injuring his neck; (5) that the normal Road Crane operators who were assigned to drive the crane were present and available to drive it when Singleton ordered Tinkle to drive the crane a distance of 80 miles on interstate highway; (6) that driving the 75 Ton Road Crane became a part of Tinkle's normal duties **only** after he testified in the *Riffel* case; and (7) that the supervisor would not allow him to return to work unless he was 100 percent able to operate and drive all heavy hauling equipment, including the 75 Ton Road Crane. Such findings support a claim of retaliation, and a substantial change in terms and conditions of his employment. Where is Mr. Singleton?

On August 21, 1997, Tinkle re-injured his neck and thereafter his doctor immediately placed him on a 2-week "light duty" schedule.[1] OG&E's retaliatory action of failing to provide Tinkle "light duty" when it was available, raises a genuine question of disputed fact.[2] Also, this act by the Employer raises the question of "bad faith" being the cause of Tinkle being placed on "short term" and "long term" disability for he was certainly capable of performing various available "light duty" assignments.[3] Even after his re-injury, he still could have performed all duty assignments had he been assigned to a truck with air-ride-suspension.[4]

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1. *See* letter from Tinkle's doctor (App. pg.1) *[This document was submitted below at Appendix to Appellant's Opening Brief in the Circuit Court at page 209 (location of document in record below hereinafter 10th App].

2. Tinkle offered evidence below by naming the various "light duty" jobs that were available. Evidence was also produced through affidavits of three others who worked in the same Heavy Hauling Equipment Unit. These documents were part of the 10th App. at pages 190-205, inclusively.

3. Tinkle was placed on short-term disability by Singleton, rather than allow him to return to work. Tinkle's deposition (2-21-00) at pg. 46, lines 16-19:

16 A. But I wasn't told or asked — I wasn't asked

17 to be put on short term or long term. John Singleton said

18 we're putting you on short term and long term and Robin

19 will fill out the paperwork.

4. Trucks equipped with air-ride-suspension were available and part of the inventory of the Employer, and this point has been amply addressed in the Pet. at pg. 2-3.

Throughout It's brief, the Employer craftily relates events to inapplicable time periods; makes general and conclusive arguments without benefit of established facts, or without specifically identifying the fact(s) in support of the argument. Example, on page "1" of the brief, the Employer states: "On August 21, 1997, **after returning to work with no medical restrictions,** Petitioner re-injured his neck. . . ." **(Emphasis ours)**. To the "reader", a conclusion is drawn that Tinkle returned to work on or about August 21, 1997, without any medical restrictions, and suffered a re-injury to his neck . Such a conclusion is erroneously reached by craftily relating a condition ("no medical restrictions") and the event to an inapplicable time period, as well as not disclosing that Tinkle was still recuperating from his neck surgery. The truth of the matter is: (1) After his neck surgery in March, 1997, Tinkle returned to work on April 28, 1997. Pet. pg. 2; (2) he was still taking off from work to keep doctor's appointments regarding his neck surgery when ordered by his supervisor to drive the 75 Ton Road Crane on August 21, 1997;[5] (3) Tinkle's supervisor knew that he was taking off from work to see the doctor regarding his recuperation from neck surgery;[6] (4) driving the 75 Ton Road Crane was not one of Tinkle's normal work assignments, as in his twenty (20) years of employment with the Employer, he had only

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5. *See* n.1 above. Below, 10th App. pg. 191,194

6. App. 1. Also, Tinkle's affidavit para.16, 10th App. 197, reads:

> At the time, Singleton ordered me to drive the 75 Ton Road Crane from Ardmore, he was fully aware of my back and neck ailments; that my body size (6' 2") was too large for the cabin of the Road Crane and, with my "hard-hat" on, my head was touching the roof of the cabin.

driven the 75 Ton Crane just on one (1) other occasion;[7] (5) the supervisor knew the danger and risk involved in assigning Tinkle to drive the 75 Ton Road Crane. (Pet. 4,5).

The Employer's primary challenge is not focused on the facts that give rise to the application of the "standard", but challenges the precedent cases decided by this Honorable Court as not being raised below. First, the sufficiency of the evidence to support a "prima facie case" must be considered. The cited precedent cases establishes the ambit for housing the "appropriate standards". *Oncale* at 81. Its putting the "cart before the horse" to consider the "standards" before consideration of the evidence. The Courts below failed to properly consider the evidence. Below, Tinkle presented evidence in support of a "prima facie case", to wit: (1) he engaged in the "protected activity" (*Riffel v. OG&E*); (2) shortly thereafter he was subjected to intensified adverse employment actions; (3) that others similarly situated were not so treated.[8] Both lower courts addressed the evidence offered in support of the "prima facie" case, but applied the wrong standard.[9] The Employer raises the principles of "hostile work" environment being raised for the first time as a "second element of the retaliation claim". In this presentation the Employer relies on the precise legal wording contained in the briefs rather than the evidence offered in support of the claim. This sort of tunnel vision is precisely

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7. This point was covered in the Petition (Pet. at pg. 4-5) and will be addressed just briefly below.

8. Tinkle's prima facie case argument appears, passim, in the Petition for Writ

9. Tinkle amply covered the misapplications by the courts below at pages 20-21 in the Petition for Writ of Certiorari.

what *Ellerth* at 753-754 and the cited companion cases clearly prohibited. Conversely, courts are directed to look at all of the evidence and to consider the totality of circumstances. *Oncale*, id. In this regard, what might be "abusive" in one case, may not be deemed to be "abusive" in another. *Oncale*, id. The facts below established that Tinkle was recuperating from neck surgery, and was still seeing his doctor, and that the supervisor intentionally subjected him to unnecessary danger and harm by altering the terms and conditions of his employment.[10]

The Employer attempts to avoid liability on the "retaliation" claim by asserting that Tinkle failed to prove that the supervisor, Singleton, had "knowledge" of Tinkle's prior EEO activity in the *Riffel* case (a question for the jury, for the Employer has acquiesced by not, in any manner, denying "knowledge"). The record is void of any statement or comment from the supervisor that he lacked "knowledge" of Tinkle's prior involvement in the "protected activity". As such, it is reasonable to believe that a supervisor is kept informed of absentees, illnesses and the general, physical and mental fitness of the men/women under his/her supervision. The evidence below shows, inter alia, that when Tinkle testified in the *Riffel* case in opposition to the Employer, Singleton was the supervisor for both Tinkle and Riffel.[11] OG&E was sued in the *Riffel* case for age discrimination. Certainly, one who is involved in litigation

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10. Alteration of "terms and conditions" appears, passim, in the Petition of Writ of Certiorari.

11. Tinkle refused to meet with OG&E's lawyer during the *Riffel* case, and his testimony was what the appeals court found as, "smoking gun", direct evidence in support of age discrimination, and reversed the district court's decision granting summary judgment. Pet. at 4.

should know when judgment is rendered and the probable reason(s) therefore. As such, the argument of "impermissible advisory opinion" is not applicable for reason that the "standard" applied is at issue — not the "ultimate outcome" of the case. The Employer relies in error on *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). The facts in *Fruehauf* are indeed distinguishable and inapplicable to the case at bar. The Court in *Fruehauf* was faced with a perplexed dilemma of not being able to determine "issues which remain unfocused because they are not pressed before the court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests. . . ." Clearly this case is 180 degrees out of phase with the holding in *Fruehauf*. The other case cited by the Employer is *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 619-20 (1950), and there are no issues that can be in any manner related to the case at bar, as a question of "standing" was raised that was not probative and had not been previously raised. A cursory review of this case shows evidence that was not considered, and the misapplication of "standards" promulgated by this honorable court. The courts below had all of the evidence in front of them but failed to apply the proper standard, and committed plain error in failing to consider evidence crucial to Tinkle's retaliation claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX — LETTER FROM JEFFREY H. SCHIMANDLE, M.D. TO JOHN SINGLETON, SUPERVISOR, OG+E, DATED AUGUST 26, 1997

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Orthopaedic and Reconstructive Spine Surgery
2149 S.W. 59th St., Suite 201
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TEL (45)681-9711/FAX (405)680-4161

John Singleton
Supervisor, OG+E

Re: David Tinkle
SSN 441-54-2197

August 26, 1997

Dear Mr. Singleton:

Mr. Tinkle was evaluated in my office yesterday for complaints of neck and left arm pain. He states that he was driving from Ardmore in a road crane on 8/21/97 and struck his head on the inside of the crane. He was recovering well from his neck fusion until this incident and now complains of aching neck/left arm pain with intermittent numbness in the arm. My examination did not reveal any significant abnormal findings and I have recommended the he engage in only light duty employment for the next two weeks until his symptoms resolve. I anticipate that he will be able to eventually resume his normal job activities.

Please let me know if I can provide you with any further information.

Sincerely,

Jeffrey H. Schimandle, M.D.